

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
MILWAUKEE DIVISION**

JAMES HULCE, et al.,

Plaintiff,

v.

ZIPONGO, INC. d/b/a FOODSMART,

Defendant.

Case No. 2:23-cv-00159-LA

**DEFENDANT ZIPONGO INC. D/B/A FOODSMART'S  
MOTION FOR SUMMARY JUDGMENT**

Defendant Zipongo, Inc. d/b/a Foodsmart (“Foodsmart”) hereby moves for summary judgment under Fed. R. Civ. P. 56. Plaintiff’s lawsuit alleges that Foodsmart violated the Telephone Consumer Protection Act (“TCPA”) by calling him on a number listed on the National Do-Not-Call (“DNC”) Registry and offering him free nutritional counseling services through his healthcare plan. But the TCPA’s DNC rules apply only to “telephone solicitations,” defined as communications that *encourage* consumers to *purchase* goods or services for sale. And none of the communications to Plaintiff regarding nutritional counseling services that were free to him through healthcare plan encouraged him to purchase any goods or services. In addition, Foodsmart isn’t liable, either through a theory of direct or vicarious liability, for the calls at issue in this suit. For these reasons, and as explained more fully in the contemporaneously filed memorandum of law, this Court should grant Foodsmart summary judgment as a matter at law.

In support of the motion, Foodsmart hereby also contemporaneously files the attached exhibits:

- Declaration of Jared Scharen

- Deposition Testimony of Plaintiff James C. Hulce
- Declaration of Richard Hamilton.

Dated: November 7, 2023

Respectfully submitted,

/s/ Ryan D. Watstein

Ryan D. Watstein

James M. Ruley

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*Attorneys for Defendant Zipongo, Inc. d/b/a  
Foodsmart*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 7, 2023, I caused to be electronically filed the foregoing document in the United States District Court for the Eastern District of Wisconsin, with notice of same being electronically served by the CM/ECF system, to all attorneys of record.

/s/ James M. Ruley  
James M. Ruley